

**MEMORANDUM TO REQUEST SECRETARY'S APPROVAL
TO BEGIN DEVELOPMENT OF A REGULATION**

TO: Honorable Patrick McDonnell
Secretary

FROM: Jay E. Patel, P.E. JEP 3/31/20
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THROUGH: Aneca Y. Atkinson, MSWREE sf for AYA
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Director
Policy Office

DATE: March 23, 2020

RE: Request to Begin Development of a Proposed Rulemaking: National Pollutant
Discharge Elimination System (NPDES) Program Under Chapter 92a

1. Title of the regulation.

25 Pa. Code § 92a.51(a) (Schedules of compliance).

2. **Summary.**

Over the past decade, the U.S. Environmental Protection Agency (EPA) has expressed concerns with the Department's NPDES permitting approach for combined sewer overflows (CSOs). Permittees with CSOs must develop Long-Term Control Plans (LTCPs) that will achieve water quality standards in the receiving waters. LTCPs have two tracks: 1) a presumption approach, in which CSOs are limited to a specific number of overflow discharges or must achieve a specific percentage capture of pollutants, where it is assumed that such infrequent overflows or a high percentage of pollutant capture will result in compliance with standards; and 2) a demonstration approach, in which permittees demonstrate that water quality standards are being achieved in spite of CSO discharges or that background water quality precludes attainment of standards. Most permittees have elected the presumption approach. There is no specific deadline for LTCP completion, and most LTCPs have schedules that envision compliance in terms of decades. NPDES permits have historically incorporated interim milestones within the 5-year permit term to assure that progress is demonstrated.

EPA has identified a conflict between the Department's regulations and NPDES permits for CSOs. EPA has pointed out that the Department cannot authorize an LTCP that calls for compliance with water quality standards (i.e., completion of implementation of CSO controls for presumption approach or demonstration that water quality standards are being met) that exceeds the 5-year permit term under the Department's own regulations. Specifically, § 92a.51(a) limits the amount of time a permittee has to come into compliance with water quality standards and effluent limitations or standards to five years.

EPA has issued specific and general objections to NPDES permits for CSOs on this basis. BCW and EPA staff have met numerous times over the past few years in an attempt to resolve this issue. In 2018, EPA recommended, and BCW agreed, to hold any further NPDES permits for CSOs until the issue was resolved. As a result, there are approximately 70 NPDES permits on hold at this time.

EPA previously proposed that each NPDES permit could be accompanied by a Consent Order and Agreement (COA) which authorizes completion of the LTCP beyond the permit term. BCW has resisted this suggestion because the up-front workload and maintenance required to execute a COA for each permit would not be sustainable. Pennsylvania has the highest number of CSO communities in the nation (i.e., approximately 130).

After numerous discussions between EPA Region 3, EPA Headquarters, and BCW, the best solution was determined to be a regulatory update to § 92a.51(a) to exempt CSO discharges under an approved LTCP from needing to meet water quality standards within 5 years. The existing provision is more stringent than federal regulations.

3. **Purpose of Regulation.**

The purpose of the proposed change to 25 Pa. Code § 92a.51(a) is to provide an exception for CSO dischargers with approved LTCPs to comply with water quality standards in accordance with the schedule contained in the approved LTCPs, resolving the longstanding dispute between

the Department and EPA and allowing renewals of NPDES permits for CSOs to move forward. The proposed regulatory revisions are as follows:

(a) With respect to an existing discharge that is not in compliance with the water quality standards and effluent limitations or standards in § 92a.44 or § 92a.12 (relating to establishing limitations, standards, and other permit conditions; and treatment requirements), the applicant shall be required in the permit to take specific steps to remedy a violation of the standards and limitations in accordance with a legally applicable schedule of compliance, in the shortest, reasonable period of time, the period to be consistent with the Federal Act. **Except as otherwise set forth in this subsection, a[A]ny schedule of compliance specified in the permit must require compliance with final enforceable effluent limitations as soon as practicable, but in no case longer than 5 years, unless a court of competent jurisdiction issues an order allowing a longer time for compliance. Compliance schedules granted to permitted CSO dischargers may exceed 5 years but shall in no event exceed the period of implementation specified in an approved long-term control plan (LTCP).**

4. What is the statutory authority for the proposal?

The statutory authority for the proposed revisions is sections 5(b)(1) and 402 of The Clean Streams Law, 35 P.S. §§ 691.5(b) and 691.402, and section 192013-A of The Administrative Code of 1929, 71. P.S. § 510-20).

5. Do companion federal regulations exist? Will this proposal be more stringent than the federal requirements?

EPA's regulations at 40 CFR § 122.47 (schedules of compliance) do not limit the permitting authority to five years for compliance.

6. Regulatory schedule:

BCW proposes to present the draft change to Chapter 92a to the Water Resources Advisory Committee (WRAC) at its May 28, 2020 meeting, and plans on presenting the draft regulation to EQB on or before its October 20, 2020 meeting. If it is determined that the proposed regulatory update will affect agriculture the proposal will be taken to the Agricultural Advisory Board for its May 21, 2020 meeting.

7. Outreach Strategy

No specific outreach strategy is considered necessary for the proposed changes.

8. How will this regulation affect your program?

The update to 25 Pa. Code § 92a.51(a) will eliminate the backlog of pending NPDES permits for CSOs, result in the removal of EPA objections, and resolve a longstanding issue with EPA on CSO permitting.

9. **Compliance Information:** Who will be affected by this regulation?

The updates to § 92a.51(a) will beneficially affect approximately 130 CSO communities.

10. **Effectiveness.** What indicators will be used to measure the effectiveness of this regulation? In what other ways will its effectiveness be measured?

The regulatory update to § 92a.51(a) will prove effective when DEP is able to reissue NPDES permits for CSOs without EPA objections.

11. **What aspects of the regulation may be controversial and with whom? How will this controversy be addressed?**

This proposed rulemaking is not likely to be controversial as it memorializes a process that has long been in place (i.e., approval of LTCPs with schedules exceeding 5 years) and offers additional information to the public through the public notice process.

12. **Will this proposal require data system modification** or development (i.e., Department or program-specific data systems)?

No data systems would need to be updated as part of the regulatory update to § 92a.51(a). Data systems have already been updated in anticipation of publishing additional information on NPDES permits to the Department’s public website.

13. List your **recommendations** on the following:

BCW recommends a 45-day public comment period for the proposed rulemaking. At least one public meeting and hearing is necessary for this proposal, unless there is significant public interest during the comment period.

_____**Patrick McDonnell**_____**4/15/2020**_____
Approved

Disapproved

bcc: Ms. Chiaruttini
 Mr. Reiley
 Ms. Shirley
 Ms. Atkinson
 Regional Water Mgmt. Prog.Mgrs. (6)
 Mr. Patel
 Mr. Furjanic
 BCW Reading File

Reviewed & approved by:		GES No:		DEP No:		Date Logged:	
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Office	BCW-NPD	BCW-DIR	OWP	EDS-P	BRC	OCC	POL
Date	3/23/2020	3/31/2020	04/01/2020	04/01/2020	04/02/20	04/02/20	4/14/20
Initial	SMF	JEP	sf for AYA	RZ via email	Bo R	AC	JS